

¹ ALJ Order (Apr. 23, 2008) at 1.

and in the course of his employment. Claimant also argues that the ALJ erred in failing to award TTD benefits as claimant testified he was physically unable to perform the accommodated job he was offered and ultimately fired from his job just one day after his injury.

Respondent contends the Board has no jurisdiction to hear this matter as it involves the issues of medical treatment and TTD benefits. Alternatively, respondent maintains the ALJ's Order should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Undersigned Board Member makes the following findings of fact and conclusions of law:

The underlying facts of the claimant's accident are succinctly stated in the ALJ's Order and will not be unnecessarily repeated. Suffice it to say that it is undisputed that claimant sustained a compensable injury on July 27, 2007. But the issue now is whether claimant's present right shoulder complaints and need for further evaluation and treatment arose out of and in the course of that July 27, 2007 accident and whether he is entitled to TTD benefits following that injury.

K.S.A. 44-534a restricts the jurisdiction of the Board to consider appeals from preliminary hearing orders to the following issues:

- (1) Whether the employee suffered an accidental injury;
- (2) Whether the injury arose out of and in the course of the employee's employment;
- (3) Whether notice is given or claim timely made;
- (4) Whether certain defenses apply.

These issues are considered jurisdictional and subject to review by the Board upon appeals from preliminary hearing orders. The Board can also review a preliminary hearing order entered by an ALJ if it is alleged the ALJ exceeded his or her jurisdiction in granting or denying the relief requested.²

Here, there is no allegation that the ALJ exceeded his jurisdiction. Rather, claimant contends the ALJ erred in failing to conclude that he met his burden of proving that the

² See K.S.A. 44-551.

right shoulder complaints, which admittedly emerged sometime after the accident, arose out of and in the course of that same accident. And claimant contends the ALJ erred in denying his request for TTD because he was physically unable to perform the accommodated work and was thereafter fired.

As for the request for TTD and the ALJ's denial of claimant's request, this Board Member finds that she has no jurisdiction to consider that issue. K.S.A. 44-534a grants sole authority to an ALJ to decide issues the payment of TTD benefits at a preliminary hearing. There is no corresponding statutory authority for the Board to review such a preliminary decision until the matter is heard and a final decision is rendered following a Regular Hearing. Accordingly, claimant's appeal as to the TTD issue is dismissed.

Turning now to the ALJ's denial of claimant's request for medical treatment to his right shoulder, this Board Member disagrees with respondent's contention that there is no jurisdiction. While it is true that an ALJ typically has the sole authority to decide issues regarding a claimant's need for treatment³, the issue in this appeal stems from the ALJ's conclusion that the claimant's right shoulder complaints "did not arise by accident out of and in the course of his employment with the respondent".⁴ That decision gives rise to the Board's jurisdiction on appeal from a preliminary hearing.

This Board Member has reviewed the claimant's testimony and the medical records and concludes the ALJ's decision as to the compensability of the right shoulder complaints should be reversed. There is no dispute that claimant fell from a ladder on July 27, 2007 and injured his right wrist. Based upon the claimant's testimony and the corresponding medical records, it appears that the injury to that wrist was the sole focus of claimant's treatment. Respondent terminated claimant within days of the injury and it is unclear what activities he's been involved in since his accident. But the medical records and his own testimony paint a picture of an individual who was having right wrist complaints, and some difficulty completing his physical therapy appointments without additional pain and swelling. And as his pain medications were decreased, he noticed his shoulder pain. It is reasonable to conclude that, in the absence of any evidence suggesting an alternative explanation, claimant's right shoulder complaints were masked by the medications and his (and the medical community's) preoccupation with his right wrist complaints. And only when the medications were tapered off did he notice and voice his complaints of right shoulder pain. While this first complaint surfaced on September 18, 2007, approximately 2 months after his accident, this Board Member is persuaded, based upon this record, that claimant has met his burden of proof. The ALJ's conclusion as to the causal connection between claimant's accident and his right shoulder complaints is reversed. Claimant's right

³ K.S.A. 44-534a.

⁴ ALJ Order (Apr. 23, 2008) at 1.

shoulder complaints are found to have arisen out of and in the course of his July 27, 2007 accident.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.⁵ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated April 23, 2008, is reversed in part and dismissed in part.

IT IS SO ORDERED.

Dated this _____ day of June 2008.

JULIE A.N. SAMPLE
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge

⁵ K.S.A. 44-534a.